UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 516

Cases No. 557: SATITE
No. 564: WILLIAMS

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding, Mr. Ahmed Osman, Second Vice-President; Mr. Luis de Posadas Montero;

Whereas, at the request of José Alberto Satite, a staff member of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 1990, the time-limit for the filing of an application to the Tribunal in case No. 557, hereinafter referred to as the "first case";

Whereas, on 6 July 1990, the Applicant in the first case filed an application, containing the following pleas:

"II. PLEAS

The Tribunal is requested:

(a) To rule that the method by which the Applicant's grade, step level and incremental date were calculated on his promotion to the Professional category was not in conformity with the Staff Regulations and Staff Rules of IMO;

(b) To order the Respondent to recalculate the grade, step level and incremental date of the Applicant in the manner determined by the Tribunal in its Judgement No. 451 (Young) and to restore the situation of the Applicant in all

respects to what it would have been if that method of calculation had been applied at the time of his promotion to the Professional category."

Whereas the Respondent filed his answer in the first case on 9 November 1990;

Whereas, on 22 November 1990, Gurpreet Singh Singhota, also a staff member of IMO, applied to intervene in the first case under article 19 of the Rules of the Tribunal, his pleas reading as follows:

"II. PLEAS

1. The Tribunal is requested to allow the application of the Intervener on the following grounds:

(a) ratione personae: the Intervener, as a staff member of the International Maritime Organization, is a person to whom the Tribunal is open under article 2, paragraph 2(a), and article 14 of the Statute of the Tribunal;

(b) ratione materiae: the position of the Intervener is in all relevant respects identical with that of the Applicant in case No. 557; he is therefore entitled to intervene under article 19, paragraph 1, of the Rules of the Tribunal.

2. The Tribunal is further requested to rule that its judgement in case No. 557 shall apply, mutatis mutandis, to the Intervener."

Whereas the Applicant in the first case filed written observations on 19 December 1990;

Whereas, on 10 October 1990, Florence Williams, a staff member of IMO, filed an application in case No. 564, hereinafter referred to as the "second case", containing the following pleas:

"II. PLEAS

The Tribunal is requested:

(a) To rule that, having offered the Applicant promotion to the Professional category with effect from 1 December

1988, the Respondent was bound to make the calculations for the determination of the Applicant's grade, step and incremental date in the Professional category in a manner consistent with the Staff Regulations and Staff Rules in force on the effective date of promotion and that she was entitled to expect that the applicable Staff Regulations and Staff Rules would be followed,

(b) To declare that the method which the Respondent proposed to use for making those calculations was not in conformity with the Staff Regulations and Staff Rules of IMO in force on the said date;

(c) To order the Respondent to give effect to his offer to promote the Applicant to the Professional category, backdated to 1 December 1988, which was accepted by the Applicant, and to calculate her grade, step level and incremental date, for the purpose of her promotion in the manner determined by the Tribunal in its Judgement No. 451 (Young) and to restore the situation of the Applicant in all respects to what it would have been if the backdated promotion, calculated as above, had been made in August 1989, when she wrote to the Secretary-General accepting promotion."

Whereas the Respondent filed his answer in the second case on 15 January 1991;

Whereas the Applicant in the second case filed written observations on 6 February 1991;

Whereas the facts common to the first and second cases and to the intervention are as follows:

IMO's Salary Policy in Promotions is set out in staff rule 103.5. The provision covers promotions within both the Professional category and the General Service category, as well as from the General Service to the Professional category. In June 1988, during the early stages of the Young case (Judgement No. 451), the Secretary-General of IMO amended staff rule 103.5 by adding two new provisions, both specifically relating to promotions of staff from the General Service to the Professional category. New paragraph (iii) specifies that post adjustment shall be taken into account in determining the level of remuneration of a staff member promoted from the General Service to the Professional category. According to paragraph 3(b) of Annex 1 to the IMO Staff Regulations, the definition of "salary" for staff in the Professional category was "net salary" except

"where otherwise provided in these Regulations"; at the request of the Respondent, the IMO Council amended this definition in October 1989, by adding the words "or any staff rule" after "Regulations" in the previous clause.

Whereas the facts particular to the first case are as follows:

The Applicant entered the service of IMO on 17 October 1982. He initially received a one-year fixed-term appointment at the G-7, step IV level, as Supervisor of the Spanish Typing Pool. He was promoted to the G-8 level, with effect from 1 July 1983. His appointment was extended for a further one-year period and, on 16 August 1984, he was offered a regular appointment.

Effective 1 September 1988, the Applicant's post was reclassified to the P-1 level. In a memorandum dated 21 February 1989, the Head, Personnel Section, informed the Applicant of the "likely impact of [his] accepting promotion from G-8 to P-1". He attached two tables with calculations based on the recently amended text of staff rule 103.5(iii), showing the financial implications of accepting a promotion on 1 September 1988 and on 1 December 1988 (i.e. before and after an increase in General Service salary rates). He also noted that: "A far more difficult situation arises with respect to pensions and it is for individual staff members to weigh the advantages on the salary side against possible disadvantages on the pension side". He set out figures which showed that the pensionable remuneration for the grade to which he would be promoted (P-1) would be lower than the pensionable remuneration at his current General Service step, and stated: "You would thus remain at the dollar equivalent GS [General Service] level pension remuneration until such time as you overtook it in the Professional category either as a consequence of general adjustments to that remuneration or by moving yourself on the scale."

The Applicant accepted the offer of promotion with effect from 1 December 1988 and was promoted. A Personnel Action Form dated 17 May 1989 was issued to implement the promotion.

On 15 June 1989, the Applicant wrote to the Respondent, attaching a copy of the Personnel Action Form implementing his promotion. He stated that: "The calculations ... and the figures on the form itself indicate that

'salary' for the purpose of calculating the increase was taken as net salary plus post adjustment" whereas paragraph 3(b) of Annex 1 to the Staff Regulations provided that "salary" was to mean net salary. He accordingly requested the Respondent to review the decision concerning the level of his remuneration on promotion to the Professional category and to revise the calculation so as to conform with the definition of salary in Annex 1 to the Staff Regulations.

By a memorandum dated 13 July 1989, the Director, Administrative Division, informed the Applicant that the Respondent had reviewed the decision concerning the level of his remuneration on promotion to the Professional category and had decided that the calculations on the Personnel Action Form dated 17 May 1989 should stand. On 3 August 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 1 February 1990. Its recommendation reads as follows:

"4. Recommendation

4.1 However, having reached the above conclusions, the Board does not feel competent to pronounce itself as to whether the Secretary-General is empowered in legal terms to introduce in Rule 103.5(iii) a departure from the definition of 'salary' in the Regulations without prior 'explicit' approval by the Council of a suitably amended Regulation.

4.2 Bearing in mind the overall intent and purpose of the rule and the possible ill feeling among other members of the staff should the 'letter' of the regulation be applied, the Board recommends that, in the best interests of the Organization, the Administrative Division should:

1. Have further talks with the Appellant aimed at reaching an equitable compromise solution which would take account of his accrued expectations and;

2. Review its administrative decision accordingly.

4.3 The Board further recommends that the definition of 'salary' in the Staff Regulations be deleted and that the text of Rule 103.5 be suitably restructured to clarify its meaning and avoid future misinterpretations."

On 27 February 1990, the Head, Personnel Section, transmitted to the Applicant a copy of the Board's report and informed him of the Respondent's decision in respect of the Board's findings as follows:

"1. He notes the Board's recommendation in paragraph 4.1;

2. He does not accept the recommendation in paragraph 4.2; and

3. He accepts the recommendation in paragraph 4.3 subject to a full review of the implications of the removal of the definition on other Regulations and Rules."

On 6 July 1990, the Applicant in the first case filed with the Tribunal the application referred to earlier.

Whereas the facts particular to the intervention are as follows:

The Intervener entered the service of IMO on 29 June 1987. He initially received a one-year fixed-term appointment at the G-8, step I level, as Programme Officer. On 1 October 1988, he was granted a permanent appointment at the P-1, step I level. On 1 November 1989, he was promoted to the P-2, step I level, and on 1 November 1990, his step level was increased to II.

On 22 November 1990, the Intervener filed with the Tribunal the intervention in the first case referred to earlier.

Whereas the facts particular to the second case are as follows:

The Applicant entered the service of IMO on 26 January 1978. She initially received a three-month fixed-term appointment as a Senior Secretary at the G-5, step IV level, which was converted to a probationary appointment on 1 May 1978 and to a regular appointment on 9 March 1979. During the course of her employment with IMO, the Applicant was promoted to the G-6 level with effect from 1 April 1982, and to the G-7 level with effect from 1 September 1985, when she was appointed Supervisor of the English Pool, Conference Division. On 1 March 1986, the Applicant was promoted to the G-8 level.

Effective 1 September 1988, the Applicant's post was reclassified to the P-1 level. In a memorandum dated 21 February 1989, the Head, Personnel Section, informed the Applicant of the "likely impact of [her] accepting promotion from G-8 to P-1". He attached two tables with calculations based on the recently amended text of staff rule 103.5(iii) showing the financial implications of accepting a promotion on 1 September 1988 and on 1 December 1988. He also noted that: "A far more difficult situation arises with respect to pensions and it is for individual staff members to weigh the advantages on the salary side against possible disadvantages on the pension side". He set out figures which showed that the pensionable remuneration for the grade to which she would be promoted (P-1) would be lower than the pensionable remuneration at her current General Service step, and stated: "You would thus remain at the dollar equivalent GS [General Service] level pension remuneration until such time as you overtook it in the Professional category either as a consequence of general adjustments to that remuneration or by moving yourself on the scale."

On 9 August 1989, the Applicant wrote to the Respondent concerning the offer of promotion. She stated that the relevant calculations of the salary which would take effect from either 1 September 1988 or 1 December 1988 "were disappointing in that the salary offered in the new Professional grade gave hardly any increase in take-home pay and did not offer any benefit with regard to pensionable remuneration because ... [she] would not have sufficient time before retirement to reach the present pensionable remuneration in the new Professional grade and surpass it". She stated that she had held several discussions on the subject with the Director, Administrative Division, as well as with her Director and had proposed that she be upgraded "to the requisite Professional grade to make the promotion worthwhile and then, after [her] retirement ..., the successor would resume the grade of the post." This would have the effect of giving her a salary in the Professional category higher than the General Service salary she was then receiving and would not put her pensionable remuneration at a disadvantage. The Director, Administrative Division, had rejected her proposal on the grounds that it would cause an unacceptable precedent in the Organization.

In a reply dated 6 September 1989, the Director, Administrative Division, informed the Applicant that the Respondent had considered her request and that while there was "no difficulty with the effective date of [her] promotion being established at 1 December 1988, the grade and step in the Professional category would be determined by staff rule 103.5(iii)". He concluded: "In other words, [the Respondent] does not share your view that staff rule 103.5, as recently amended, cannot be implemented because of the definition of 'salary' in the Staff Regulations."

The Applicant chose not to be promoted to the Professional category.

On 19 September 1989, the Applicant requested the Respondent to review his decision concerning the methodology applied in calculating her salary on promotion. Having received no reply, on 24 October 1989, the Applicant lodged an appeal with the JAB. The Board adopted its report on 31 August 1990. Its recommendation reads identically to that quoted above in respect of the first case.

On 12 September 1990, the Head, Personnel Section, transmitted to the Applicant a copy of the Board's report and informed her of the Respondent's decision in respect of the Board's findings, which was identical to the decision of 27 February 1990, quoted above in respect of the first case.

On 10 October 1990, the Applicant in the second case filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Respondent acted improperly in adding a paragraph (iii) to staff rule 103.5, which addition was inconsistent with the definition of "salary" in the Staff Regulations.

2. The Respondent violated the Staff Regulations and the principle established by the Administrative Tribunal in Judgement No. 451, Young by applying staff rule 103.5(iii) to the Applicant in the first case, on his promotion, and by notifying the Applicant in the second case, of the proposed application of this rule to her should she accept promotion.

Whereas the Respondent's principal contention is:

There is nothing incompatible between staff rule 103.5(iii) and the definition of the term "salary" for Professional staff which was in effect

at the time of the promotion of the Applicant in the first case and the offer of a promotion to the Applicant in the second case. The Rule was consistent with the Staff Regulations and Rules of IMO, and the Respondent acted lawfully by applying the Rule and in indicating it would be applied.

Whereas the Intervener's principal contention is that his situation is substantively identical to that of the Applicant in the first case and therefore the latter's contentions are also applicable to the Intervener.

The Tribunal, having deliberated from 8 to 28 May 1991, now pronounces the following judgement:

I. The issue in these two cases is essentially the same and, therefore, the Tribunal will consider them together. In both cases the staff members, originally in the General Service category, were offered promotion to the Professional category. Upon receiving the offer, they were duly informed of staff rule 103.5, which provided the system for establishing their respective salary levels and steps-in-grade in passing from one category to the other. Both staff members were of the opinion that the system was erroneous since it was based on a staff rule that they viewed as lacking any legal force.

II. Faced with this situation, the Applicant Williams declined the offer of a promotion whereas the Applicant Satite accepted it, both subsequently challenging the validity of the rule relied on by the Respondent.

III. The contention of both Applicants is that the judgement of the Tribunal in Young (Judgement No. 451) specifies the way in which the remuneration in the Professional category should be fixed in connection with a promotion from the General Service category, and that the Respondent must abide by that ruling. The Respondent claims that the situation had changed since the judgement in Young by the introduction of a new staff rule providing for a different system governing promotions from the General Service to the Professional category. The Applicants, on their side, claim that such new rule is not valid and that the old system should continue to be applied.

IV. The issue before the Tribunal is therefore the validity of the staff rule relied on by the Respondent in respect to the Applicants' promotions. The provision in question is paragraph (iii) of staff rule 103.5, which reads as follows:

> "On promotion of a staff member from the General Service category to the Professional category, the staff member's step in the Professional level and the date of his or her next salary increment shall be determined in such a way that the total of the new net base salary plus the appropriate post adjustment at the single rate shall, during the first year following promotion, exceed the salary which the staff member received in the General Service category by the amount of one step in the new salary level, including the non-resident's allowance, if applicable,"

This rule was approved, as all staff rules are, on the sole authority of the Respondent, the Secretary-General of IMO, and subsequently communicated to the Council of the Organization, which took note of it in due course.

V. The Applicants submit that the Respondent had no power to approve such a rule because its wording contradicts that of paragraph 3(b) of Annex 1 to the Staff Regulations, as interpreted by the Tribunal in the Young case. The Applicants' view is that, as staff regulations are norms of a higher level since they have to be approved by the Council of the Organization, they cannot be modified by staff rules which are of a lower level and only require approval by the Secretary-General. Nor, for the same reason, according to the Applicants, can staff rules contradict the provisions of staff regulations in any way. It is the Applicants' contention that the expression "salary" used in paragraph 3(b) of Annex 1 to the Staff Regulations, and interpreted as indicated by the Tribunal in the Young case, should continue to be applied in promotions from the General Service to the Professional category, therefore, in their view, the insertion of a new paragraph in staff rule 103.5 should be disregarded as being illegal inasmuch as the Respondent had no power to alter, on his own authority, a norm of a higher level.

VI. The Tribunal firmly upholds the principle of the hierarchy of norms and, therefore, a norm of inferior level could not lawfully contradict one of a higher level.

VII. Bearing in mind this principle, the Tribunal in the present instance finds that paragraph (iii) of staff rule 103.5 in no way contradicted paragraph 3(b) of Annex 1 to the Staff Regulations, as it read at the time in question. It also finds that the Respondent acted within the limits of his competence when he added paragraph (iii) to staff rule 103.5. Nor is the Tribunal able to find in the paragraph any inconsistency with its judgement in the Young case.

VIII. On the contrary, the Tribunal considers that paragraph (iii) of staff rule 103.5 shows that the Respondent has completely accepted the Tribunal's view that:

> "Since the Staff Regulations nowhere provide for a different meaning of 'salary' in the case of promotion from the General Service to the Professional category and since there is nothing in Staff Rule 103.5 or elsewhere in the Staff Rules which supplements that meaning with any additional element, it seems obvious that this is indeed the meaning of 'salary' for purposes of promotion from the General Service to the Professional category". (Emphasis added) (Judgement No. 451, Young, paragraph III)

The conclusion reached by the Tribunal in the Young case was therefore based largely on the fact that the meaning of the word "salary" in the Staff Regulations was not supplemented, as it might have been, by a clarification embodied in the Staff Rules and, furthermore, that the exact sense of the word "salary" could (and should) be fixed by a provision in the Staff Rules.

IX. Subsequently, this was done through the inclusion of paragraph (iii) in staff rule 103.5. It is the Tribunal's opinion that there is no ground to challenge the authority of the Respondent to develop and clarify the provisions of a staff regulation, as long as such an exercise is consistent with that regulation.

X. In this instance, the word "salary" is taken in the same sense as in paragraph 3(b) of Annex 1 to the Staff Regulations, i.e. as net salary, the only change being that, alongside "salary" so defined, paragraph (iii) of staff rule 103.5 requires that post adjustment be taken into consideration in determining the new situation of any staff member who is promoted from the General Service to the Professional category. The inclusion of the words "post adjustment" after "salary" in no way alters the meaning of "salary", as defined by paragraph 3(b) of Annex 1 to the Staff Regulations.

XI. The Applicants also challenge the validity of paragraph (iii) by claiming that the addition of this paragraph to staff rule 103.5 was due to the fact that the Respondent wished to avoid the consequences of extending to other staff members the system used in Young following the Tribunal's judgement. The Tribunal finds no fault in this. The Respondent should always be free to correct, through the normal legal channels, any existing situation calling for correction. In fact, in Young, the Tribunal specifically pointed out such a possibility.

XII. Finally, the Applicants find the confirmation of their assertion that the Respondent had exceeded his authority when approving paragraph (iii) of staff rule 103.5, in the fact that the Respondent subsequently proposed a modification to paragraph 3(b) of Annex 1 to the Staff Regulations explicitly permitting the meaning of "salary" to be defined either through a staff regulation or a staff rule. It is the contention of the Applicants that, since the Respondent felt it necessary to propose such a modification, it is to be concluded that, before the modification was approved in 1989, the definition of the term "salary" was exclusively subject to the the Staff Regulations. The Tribunal finds this argument irrelevant. As shown supra, the term "salary" in paragraph (iii) of staff rule 103.5 is used in compliance with the relevant staff regulation in force at the time, i.e. it is used as meaning "net salary". The mere fact that the phrase "plus the appropriate post adjustment" follows, shows that "salary" was taken in the sense defined by paragraph 3(b) of Annex 1 to the Staff Regulations. Therefore, the argument whether, before the modification of the staff regulations proposed by the Respondent, it was or was not possible to define the term "salary" through a staff rule has no bearing on this case.

XIII. For the foregoing reasons, the applications by Mr. Satite and Miss Williams are rejected in their entirety.

XIV. Subsequent to deciding on its Judgement in case No. 557, the Tribunal, having considered Mr. Singhota's request for intervention, finds that, as a consequence of that decision, the request for intervention has been rendered moot.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Ahmed OSMAN
Second Vice-President

Luis de POSADAS MONTERO
Member

Geneva, 28 May 1991

Paul C. SZASZ
Acting Executive Secretary